

UNIVERSITY OF KANSAS SCHOOL OF LAW “POST-PANDEMIC PRIVACY” SYMPOSIUM: KEYNOTE SPEECH*

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First, I want to frame reproductive justice because that is the way that I think about the world and the way that I think about these issues. I want to talk about how the pandemic has impacted reproductive justice and the right to privacy. And then I want to end with what the end of *Roe* portends for the future of reproductive privacy—and I say the end of *Roe*¹ with a fair amount of certainty because I think it’s better to be fatalistic a little bit and plan for the future rather than imagine that we’re going to get a particularly positive outcome from this Court if you believe that *Roe* was correctly decided.

As I talk today, I’m going to use the words “women” and “pregnant women.” I’ll also use “pregnant people” and “people capable of pregnancy” because cis women, of course, are not the only people who get pregnant. But there are lots of places in my work where the category of “woman,” and the way that women have traditionally been treated in this country, really matters—particularly Black women. And I don’t want to forget that, so I won’t always be using gender-neutral terms. So, as I said, I really want to start from the beginning so that we all have the sort of same sense of what I’m talking about when I talk about “reproductive justice.”

Reproductive Justice is a movement and a term that was coined by Black women in 1994² who were interested in articulating principles of a movement that went beyond reproductive rights and a pretty narrow focus on abortion—which had really been the issue that mainstream reproductive rights focused

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¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² Vanessa Williams, *Why Black Women Issued a Public Demand for ‘Reproductive Justice’ 25 Years Ago*, WASH. POST (Aug. 16, 2019), <https://www.washingtonpost.com/nation/2019/08/16/reproductive-justice-how-women-color-asserted-their-voice-abortion-rights-movement/> [<https://perma.cc/6GBV-W85V>].

on—and choice. Instead, the founder really switched that focus to issues that were especially salient to marginalized women and centered the experiences of those women in their movement and ultimately in the theory of reproductive justice that flows from that. Reproductive justice encompasses a woman's human right to decide if, and when, she'll have a baby and the conditions under which she'll give birth, to decide if she won't have a baby, and her options for preventing or ending a pregnancy; and then to parent the children that she already has with the necessary social supports, in safe environments and healthy communities, and without fear of violence from individuals or from the government.

Just hearing those words should give you a sense that reproductive justice is much more expansive than a reproductive rights paradigm. As I said, it's human rights-based, it is intersectional in the true sense of that word—and what I mean by that is that it focuses on the experiences of Black women for whom sitting at that intersection of blackness and being female means that our experiences of discrimination and oppression aren't simply about being Black *or* being female but often come from that very specific experience of sitting at that intersection of those two identities.

It is rooted in the experiences of women of color, which means that reproductive justice doesn't center the experiences of white women but places the experiences of Black women and other women of color, who sit at the furthest margins of being protected, at its center. Because what we know is that when we act to protect white women, lots of women often get left out of that protection. When we act to protect women of color and Black women, and other marginalized women, white women often benefit from that and, in fact, often benefit more than women of color.

And then, finally, reproductive justice recognizes that reproductive oppression is experienced differently for people of color and other people from marginalized communities. So again, as I said, it should be obvious that reproductive justice is much more expansive than our general reproductive rights discourse. It encompasses environmental justice, criminal justice reform, education reform, health care reform, the end of income inequality, the expansion of voting rights—all of these things.

As a person who is a reproductive rights scholar, I am really concerned with how the law acts as both a barrier and a burden to reproduction and parenting to many women based on socioeconomic factors like race, income, education level, disability status, immigration status, histories of incarceration, and more. And as well, I'm interested in the ways in which U.S. law and U.S. lawmakers devalue reproduction for Black people, and people of color in general, in this country. And the examples of that, particularly for Black folks, are legion. Everything from the abuse of enslaved women to decades of forced or coerced sterilizations in this country to a modern child welfare system that punishes poverty much more than it protects children. So, that's the reproductive justice paradigm.

Let me shift now to talking about reproductive justice within the context of law. When you heard all of the things that I said are part of the reproductive

justice paradigm, I'm sure it's obvious to all of you the extent to which law can and does support reproductive justice is often rooted in the right to privacy as it's been articulated by the Supreme Court in the Fourteenth Amendment and then other Amendments, of course, depending upon which cases you happen to be reading at the time. And there are really three core constitutional rights that are involved when we talk about reproductive justice: the right to procreate; the right to not procreate; and the right to parent our children in safe and healthy environments. So, we are talking about cases like *Meyer v. Nebraska*,³ *Prince v. Massachusetts*,⁴ *Skinner v. Oklahoma*,⁵ *Griswold*⁶ and *Eisenstadt*,⁷ *Roe*⁸ and *Planned Parenthood v. Casey*⁹—the cases that protect our right to the care, custody, and control of our minor children, our right to procreate, our right to access birth control, both for married people and single people, the right to terminate a pregnancy, and the right to marry interracial or to marry a same-sex partner. And now, importantly, and we all know this because we're law-related people, none of these rights appear as such in the text of the Constitution. So, you've got reproductive justice and then we've got this sort of broad range of law that supports at least the idea of reproductive justice—even if it doesn't evenly protect that idea across communities, across time, and across place.

Everything that I've said so far is pretty standard in terms of an opening and hopefully isn't too controversial. And it's all really foundational to the work that I do as a reproductive justice scholar and it's really sort of a mainstay of the talks that I usually give and the talks certainly that I gave prior to March 2020 when, as we all know, the world went into a major upheaval. But I am giving this talk in 2022 when, despite those who want to declare that COVID is over because they are over it, we are still living in this very devastating and difficult timeline. Over the last several years, we have really leaned into the ways in which our COVID world was supposedly not normal, and obviously there were lots of ways in which that was true, right? Moving through the world wearing a mask, social distancing, and moving all our law schools online, right? Those were things that were not normal. And yet so much about the world that we have lived in during COVID is stunningly ordinary, predictable, and normal—starting with the constant reminders of the extremely precarious state of Black people and Black and brown bodies.

Remember that reproductive justice says that every mother, every parent, deserves to be able to raise her children in safe and healthy environments. But we know that across a whole host of measures, Black people are less well-off in this country than white people. Whether it is disproportionate representation in the child welfare system and in our prison system, whether it is about

³ 262 U.S. 390 (1923).

⁴ 321 U.S. 158 (1944).

⁵ 316 U.S. 535 (1942).

⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

⁹ 505 U.S. 833 (1992).

insurance or access to medical care, whether it is about access to education, there are so many different measures by which we can say that the experience of being Black in this country is substantially different than the experience of being white. And so, given that, there's nothing surprising about the fact that there has been a wildly disproportionate impact of COVID-19 on Black and brown communities, marked by the painfully high number of infections and deaths and this data, you could look at it either in 2020 or you can move to 2021 and 2022 and we're still going to see the same things. Which is that Black and brown folks were dying in numbers, and getting sick in numbers, disproportionate to our reality in terms of how many of us are a part of this country.

Of course, the impacts of a pandemic are going to be economic, and psychological as well, and we've had research on that also. That the experience of economic challenges is substantially more for people of color. That women, in particular, are experiencing particular emotional hurdle and emotional pain as a consequence of the pandemic. And that also the mental health concerns for Black and Latino respondents tended to be higher in talking about how the pandemic has impacted them. And, again, none of this should be surprising and none of it should be something where we say, "How could that have happened?"

There are lots of other things that we have seen over the last few years as well. One is watching poor women, and poor people in general, who are already on the brink of economic disaster in whatever the best of times are, forced to continue to engage in low-wage work because suddenly they were essential. And so, we saw, women and others who were earning minimum wage, who had to brave public transportation, who had to deal with the disappearance of child care in many cases, employers with inadequate or no personal protective equipment, belligerent customers, and all of this to bring home paltry paychecks which didn't even cover their expenses. We had children who lost access to food, to dental care, to mental health services as all of those things collapsed when public schools closed because that is the venue through which so many low-income children receive a wide range of services that are necessary for them. We watched states particularly, but not only, in the South doubling down on their voter suppression efforts as the Voting Rights Act¹⁰ sits decimated by the Supreme Court and unprotected by Congress.

And through it all, we watch Black mothers continue to bury their children too soon in a country where maternal and infant mortality rates for Black women far outstrip those of white women—but also, in a country where the violence of law enforcement is directed at Black bodies substantially more than we see it directed at other communities. And so, a long line of Black mothers mourn children who are gone too soon. Women like Mamie Till, the mother of Emmett Till, Gwen Carr, the mother of Eric Garner, Lesley McSpadden, the mother of Michael Brown, and Sabrina Fulton, the mother of

¹⁰ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

Trayvon Martin. We continue to watch the suffering of Black mothers in this country who haven't been able to protect their children from violence in their neighborhoods, from the school-to-prison pipeline, from police brutality, from preventable illnesses, from medical neglect within our health care system, and more, and more, and more.

And then, of course, as I said, the mothers who go home without babies and the babies who go home without mothers in a country where Black infants are 2.3 times more likely to die than white infants¹¹ and Black women are 2.5 times more likely to die from childbirth than white women.¹² So make no mistake that, this country, which calls itself the greatest country in the world, continues to have one of the highest rates of maternal morbidity and mortality in the world. Pregnancy and childbirth can still very much be a death sentence.

Women who still subjected to sterilization without their consent or knowledge because some physicians feel like they know better than we do—what should be happening with our bodies. And some of you may remember, and everything seems like so long ago within the context of the pandemic, but there was a nurse named Dawn Wooten who was a whistleblower who talked about sterilizations that were happening on women who were being held at an Immigration and Customs Enforcement detention center down in Georgia.¹³ We talked about it for about five minutes and then it disappeared from the news cycle. But this, of course, is part of a very long pattern of forced sterilizations or coerced sterilizations against women of color in this country.

And then, finally, the politicians who used the pandemic to cut off abortion access by declaring abortion services to be non-essential and then denying access to telehealth for medication abortions. All of this in a pandemic where all kinds of medical care had been shifted over to telehealth. And yet, access to being able to terminate a pregnancy was not. We well know that making it harder to get an abortion is very much an attack on Black women who disproportionately have abortions in this country and who bear the brunt when forced to carry pregnancies to term that they otherwise would have terminated.

I've said all of these depressing things and now I want to talk about the implications for privacy. What does any of this have to do with privacy? I say everything, or at least a lot. The right to privacy in this country is obviously imperfect because if it were being doled out in a reasonable and fair way, we

¹¹ Sahar Q. Khan, Amy Berrington de Gonzalez, Ana F. Best, Yingxi Chen, Emily A. Haozous, Erik J. Rodriguez, Susan Spillane, David A. Thomas, Diana Withrow, Neal D. Freedman & Meredith S. Shiels, *Infant and Youth Mortality Trends by Race/Ethnicity and Cause of Death in the United States*, 172 JAMA PEDIATRICS no. 12, 2018, at 2.

¹² Marian F. MacDorman, Marie Thoma, Eugene Declercq & Elizabeth A. Howell, *Racial and Ethnic Disparities in Maternal Mortality in the United States Using Enhanced Vital Records, 2016-2017*, AM. J. PUB. HEALTH 1673, 1673 (2021).

¹³ Rachel Treisman, *Whistleblower Alleges 'Medical Neglect,' Questionable Hysterectomies of ICE Detainees*, NPR (Sept. 16, 2020, 4:43 AM), <https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detainees> [https://perma.cc/F267-8ES8].

wouldn't see the kind of inadequacies and the kinds of unfairness that I have already articulated here. But, even as imperfect as it is, it is still something. And right now, it is deeply at risk. Everyone here no doubt knows that the right to abortion that was articulated in *Roe v. Wade*, and significantly modified but not overruled in *Planned Parenthood v. Casey*, is on its last legs. And we will know its fate in June when the Court makes its decision in *Dobbs v. Jackson Women's Health Organization*¹⁴—the case that is challenging Mississippi's fifteen-week abortion ban which is unquestionably unconstitutional under *Roe* and under *Casey*. Now, if you listen to the *Dobbs* argument, you can see why the concerns about privacy should really be prominent here because that conversation was not just about abortion and the briefs weren't just about abortion.

I'm going to give you a couple of examples of what I'm talking about here. In the *Dobbs* argument, Justice Sotomayor asked Solicitor General Stewart, who was arguing on behalf of Mississippi, whether overruling *Roe* would lead to the loss of other constitutional rights that were similarly rooted in privacy, like the right to marry interracial, so *Loving v. Virginia*, or marry a same-sex partner, so *Obergefell v. Hodges*, or the right to access contraception, and, in response, Solicitor General Stewart claimed that these rights were not at risk.¹⁵ And here's how he answered that question:

I think the vast run of those cases—and some mentioned from time to time are *Griswold*, *Lawrence*, and *Obergefell*—these are—these are cases that draw clear rules: you can't ban contraception, you can't ban intimate romantic relationships between consenting adults, can't ban marriage of people of the same sex, clear rules that have engendered strong reliance interests and that have not produced negative consequences or all the many other negative stare decisis considerations. . . .¹⁶

He also continued, and I won't talk about this, but I want to at least put it out into the world, he continued, quote, "I'd add none of them involved the purposeful termination of a human life. So those two—those two features, stare decisis and termination of a human life, Your Honor, puts all of those safely out of reach if the Court overrules here."¹⁷ Now, as an aside of course, we are one of the countries that continues to put people to death at the hands of the government. So, the idea that the *only* situation in which we're talking about the termination of human life is in abortion is a little odd of an argument to make. But, moving past that, the Mississippi solicitor general's claim in front of the Court is really belied by the words of some of the amici who clearly understand, and are eager to see, what other havoc can be wreaked on the rights of marginalized communities should and when *Roe* falls and in so doing undermine the entire canon of the constitutional right to privacy.

¹⁴ 141 S. Ct. 2619, 2619 (2021) (granting cert.).

¹⁵ Oral Argument at 24:59, *Dobbs v. Jackson Whole Women's Health Org.* (No. 19-1392), <https://www.oyez.org/cases/2021/19-1392>.

¹⁶ Oral Argument at 22:53, *Dobbs v. Jackson Whole Women's Health Org.* (No. 19-1392), <https://www.oyez.org/cases/2021/19-1392>.

¹⁷ *Id.*

I want to show you an excerpt from one of the amicus briefs that was filed in *Dobbs* by Texas Right to Life. That amicus brief repeatedly refers to *Roe* and all its progeny as lawless. And so here's the quote:

This is not to say that the Court should announce the overruling of *Lawrence* and *Obergefell* if it decides to overrule *Roe* and *Casey* in this case. But neither should the Court hesitate to write an opinion that leaves those decisions hanging by a thread. *Lawrence* and *Obergefell*, while far less hazardous to human life, are as lawless as *Roe*.¹⁸

Note that he doesn't say that *Lawrence* and *Obergefell* aren't hazardous to human life, just that they are less hazardous. So, I'd love to have some expansion on what that means. But ultimately, the point here is that privacy hangs in the balance. And so, if you care about privacy, then you should care about what's about to happen in *Dobbs* in just a few months.

In my last bit of time here, I really want to end with a story and then also by posing some questions to you. Now, many of you certainly know about the case of *Buck v. Bell*,¹⁹ one of the most notorious cases from the eugenics era in the United States when many states had laws that allowed for the forced sterilization of people who were considered undesirables. And in this case, Carrie Buck was considered to be a so-called feeble-minded person and therefore a candidate for forced sterilization. In that opinion, Justice Holmes famously wrote, "Three generations of imbeciles are enough."²⁰ One of the most infamous quotes, I would say, from a U.S. Supreme Court case. So, lots of people know about Carrie Buck and her family, but I want to talk about another family. I want to talk about the Relf family and particularly the Relf sisters.

The Relf sisters were Katie, Mary Alice, and Minnie.²¹ They were three sisters who were living with their parents in public housing in Montgomery, Alabama, in 1973.²² Minnie and Mary Alice were the two youngest girls, both of whom were developmentally disabled.²³ This family—like a lot of poor Black families at the time in Alabama—was receiving various kinds of services from the family planning clinic of the Montgomery Community Action Committee (CAC) which was funded and controlled by the Office of Economic Opportunity.²⁴ So, a federal agency was funding this work that was happening. And for many years, representatives from the CAC were deeply involved in the reproductive health care that the Relf sisters were getting, starting with giving experimental birth control shots to Katie in 1971, and then also starting to give those shots to the younger girls later on. Bringing Katie to

¹⁸ Brief of Texas right to Life as Amicus Curiae in Support of the Petitioners, *Dobbs v. Jackson Whole Women's Health Org.*, (No. 19-1392).

¹⁹ 274 U.S. 200 (1927).

²⁰ *Id.* at 207.

²¹ B. Drummond Ayres Jr., *Racism, Ethics and Rights at Issue in Sterilization Case*, N.Y. Times, July 2, 1973, at 10.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

the hospital to get her an intrauterine device in 1973 even though she didn't ask for it and her parents didn't ask for it.²⁵

And then, also in 1973, a nurse showed up one day at the Relf home and picked up Mrs. Relf, Mary Alice, and Minnie, who at that time were fourteen and twelve respectively.²⁶ They ended up at a local hospital, where the nurse asked Mrs. Relf to sign a consent form.²⁷ Mrs. Relf couldn't read or write, and she believed that what she was signing was a form that would allow for the continuing use of the birth control shots that the girls were already getting, so she signed an "x" on that consent form, seemingly to agree to treatment for her children.²⁸ She was told to leave the girls in the hospital, which she did.²⁹ They stayed overnight and the next morning doctors administered general anesthesia to Minnie and Mary Alice and surgically sterilized both girls.³⁰ And I'll remind you again, they were twelve and fourteen at the time³¹ and in the picture you can actually see the scars from that surgery.

This kind of abusive use of sterilization against two poor, Black girls was part of a much larger pattern of forced and coerced sterilizations conducted in this country, often in public hospitals. We had the same thing happening in California with Chicana women, we had it happening in the South with Black women, we had it happening in Puerto Rico. Fannie Lou Hamer actually used to refer to these procedures as "Mississippi appendectomies" because they happened so frequently.³² A Black woman would go into the hospital for regular care or for obstetrical care and she would be sterilized, oftentimes without even being told what was happening.

Eventually, the Southern Poverty Law Center filed suit on behalf of the Relf sisters and others who were similarly situated, and the lawsuit ended up settling by creating significant regulations and standards for consent for sterilization procedures. I shared the Relf story in some detail because it's really vital in this reproductive health care space to take note of the ways in which reproductive oppression and reproductive hierarchies have very deep intersectional implications. For the Relf sisters, it was a combination of being Black, female, developmentally disabled, and poor that led to their unconsented sterilization.

We sit here now at what I would say is a critical point in our country, in our political system, in our democracy, and in our courts. The pandemic has really shone a glaring spotlight on issues that aren't at all new but that continue

²⁵ Kathryn Krase, *The History of Forced Sterilization in the United States*, OUR BODIES OURSELVES (Oct. 1, 2014), <https://www.ourbodiesourselves.org/book-excerpts/health-article/forced-sterilization/> [https://perma.cc/B9XB-7JJ4].

²⁶ See Ayres, *supra* note 21.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² Keeanga-Yamahatta Taylor, *Black America Has Reason To Question Authorities*, NEW YORKER (Jan. 10, 2021), <https://www.newyorker.com/news/our-columnists/black-america-has-reason-to-question-authorities> [https://perma.cc/QFX4-E5KK].

to plague us because there is insufficient political will to make them relics of our past. The end of *Roe* is a scary prospect for those of us who are pro-choice. But, poor women, women of color, women in rural communities, young women, undocumented immigrants, and others have had limited access to abortion services for years as states have used the leeway created in *Casey* to drive clinics out of business and create insurmountable obstacles to those who were seeking abortion care and who had little resources.

Our failure to provide highly affordable, high-quality childcare, an acceptable minimum wage, adequate enforcement of laws against pregnancy discrimination in workplaces dominated by low-wage workers, or affordable housing means that choices about pregnancy and parenting are too often made based on the deep inadequacy of our social safety net and the lack of enforcement of our often stated, but seldom realized, so-called commitment to families and family values.

The failure to reform the law on qualified immunity means that police officers can continue to take the lives of our fathers, our sons, our daughters, our mothers, and friends with little or no repercussions. And engaging in the fantasy that race is no longer a dominant axis of oppression in this country means that the Court can erase critical parts of the Voting Rights Act and watch as states pass voter ID laws, close polls in communities of color, slash opportunities for early voting and mail-in voting—as a modern-day version of poll taxes and literacy tests. We know where so many of our societal failures lie, but we refuse to fix them. Not because they can't be fixed, but because doing so doesn't serve the interests of those for whom white supremacy, by any name, is better than a country that truly lives its professed ideals.

So, for me, the most important lesson we can draw from the pandemic is that we continue to march down a very wrong path and there is much, much work left to be done. The fact that in a relatively short timeframe in this country we watched a pendulum swing from a supposed racial reckoning to the passage of laws banning so-called critical race theory in elementary schools to protect the feelings of white children, that tells me that the lesson has been very lost on so many of us. Now, this is a very bleak assessment for a Friday. I accept that. So, I promise I will say something uplifting before I end. But not quite yet. I want to be clear that I'm not taking the position that the only way to protect these rights that I've been talking about—these rights that so many of us hold dear—is through the right to privacy. And perhaps appeals to equality or even the freedom guaranteed by the Thirteenth Amendment as some have argued will ultimately come to our rescue. But I don't hold out hope that this Supreme Court, certainly not as it is presently construed, has any interest in protecting these rights or recreating them if *Roe* gets overruled.

But if we must wait for the Court to change for other arguments to find sway, we know exactly who will suffer: the same women who are suffering now because their needs are not centered in our discourse. We're living through extraordinary times that tragically highlight how ordinary oppression is in this country and how deeply and swiftly those with power consolidate their strength when they see their ability to dominate the narrative starting to

slip through their fingers. As the amazing scholar Dorothy Roberts has said, “The thing about reproduction is that, more than anything else, it tells you how a society values people.”³³

Are we going to continue to live in a country where privacy is a privilege for some and a right for others? Will privacy become even more of a luxury good to be doled out along the lines of race and class to those who already sit at the top of our reproductive hierarchies. And a final question, which is really a paraphrase of a question that was posed by Justice Sotomayor to the Mississippi solicitor general during the *Dobbs* argument, will this country survive the stench that our failure to change creates in the public perception that the Constitution and its reading are just political acts?

³³ Moira Brennan, *Dorothy Roberts: What We Talk About When We Talk About Reproductive Rights*, MS. MAG., Apr.-May 2001, at 78.